

OCT 27 1943

CHARLES ELMORE CRAPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. **461**

GEORGE F. SALOMON,
Petitioner,
against

THE CITY OF NEW YORK,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GEORGE F. SALOMON,
Pro Se.

ROBERT C. BIRKHAHN,
of Counsel.



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against

THE CITY OF NEW YORK,
Respondent.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, George F. Salomon, respectfully represents:

Matter Involved

That he seeks a review of the order and mandate entered by the Circuit Court of Appeals for the Second Circuit on the 29th day of June, 1943 (Rec. pp. 91, 92), affirming the order of the District Court, Southern District of New York, entered the 18th day of December, 1942 (Rec. pp. 66-7), enjoining petitioner from prosecuting his action instituted and pending in the State Court against the respondent, as successor to the interests and obligations of the Interborough Rapid Transit Co., to recover unpaid guaranteed payments (Rec. pp. 23-27, fols. 68-80).

In that action your petitioner seeks to recover \$21,840 remaining unpaid on 320 shares of Manhattan Guaranteed Stock owned by him, and alleged to have accrued between

October 1, 1932 and the commencement of the action (Rec. pp. 23-27). The respondent's obligation to pay such amount is claimed to stem from the fact that the respondent, in acquiring Interborough securities under state laws authorizing it to acquire them, and thereby to take over the Interborough railway system under the enabling laws of the State of New York, succeeded to and assumed the obligations of the Interborough as stated above. See provisions of Public Service Law of New York, Sections 123 and 124 (Rec. p. 86).

The respondent joined issue in said suit by service of its answer (Rec. pp. 27-42), and pleaded therein, in bar of recovery, a certain order in an alleged "class suit" (Rec. p. 38, fol. 112; Exhibit C, p. 42, fol. 125), and certain other decrees in the District Court alleged to have adjudicated the issues raised in the State Court action, and to have enjoined petitioner from suing respondent on the claim in suit.

About three months after joining issue as aforesaid, respondent applied to the District Court (Rec. pp. 6-23) for an order enjoining petitioner from further prosecuting the action in the State Court on the ground that:

"The issues raised by the action brought by said George F. Salomon have been heard and adjudicated by this Court in these proceedings. By various decrees and orders, hereinafter set forth, this Court has permanently enjoined the bringing of actions against the City of New York for the relief demanded in the action instituted against the City by said George F. Salomon, and such decrees and orders are binding upon him." (Pet., Rec. p. 7, fol. 20)

In said application respondent showed (Rec. p. 21, allegation 17, fols. 61-63) that among the various decrees and orders referred to in the above excerpt, were those issued in said alleged "class suit". Petitioner entered

his objections and answer to the application (Rec. pp. 43-50, fols. 127-150).

Petitioner respectfully refers to said objections and answer, to show his action in the State Court against respondent, for said money, is, as aforesaid, as successor to the said obligations and interests.

The District Court granted the petition and entered the order in question (Rec. pp. 66-67), holding that the claim in suit was extinguished (Opinion, Rec. p. 62, fol. 186) in a prior alleged "class suit" in the District Court (*idem*, Rec. p. 63, fols. 187-188), and that the petitioner was enjoined from suing the respondent on the claim in suit (*idem*, Rec. 64-65, fols. 192-193); seemingly in conflict with the provision of Section 265 of the Federal Judicial Code, as interpreted by this Court in *Toucey v. N. Y. Life Ins. Co.* (314 U. S. 118).

On appeal from the order, the Circuit Court affirmed the same on another ground,—to wit: that notwithstanding the prohibition of Section 265 of the Federal Judicial Code, the District Court is authorized to enjoin a State Court action in order to enforce its decrees when necessary to protect the title of a purchaser of res formerly in its custody (Opinion, Rec. pp. 76-77)—contrary to the well established rule in this Court that an appellate court may not sustain an adjudication upon a ground other than that on which it was predicated in the court below, as petitioner is advised.

Your petitioner then applied to the Circuit Court for a rehearing on the ground that, on the appeal, it was obliged to rule on the questions of the authority of the District Court to have had the proceedings in which it made the decrees relied on, and the jurisdiction of the District Court over the Plan and Agreement (Pet., Rec. pp. 78-90).

In summarily dismissing the application (Order, Rec. p. 91), petitioner is further advised, that the Circuit Court

failed to follow the well settled rule of this Court that a challenge to jurisdiction is always timely, may be invoked collaterally and should be considered and passed on by the Appellate Court where it had not been passed on by the court below.

Basis of This Court's Jurisdiction

The jurisdiction of this Court to review the order of the Circuit Court of Appeals is to be found in Sections 240(a) and 262 of the Federal Judicial Code as amended.

The time to file a petition for writ of certiorari was extended to and including October 29, 1943, by order dated, September 21, 1943 (Rec. p. 93).

Petitioner Is Advised that the Prospective Review Poses the Following Questions

1. May a Federal Court enjoin prosecution of an action pending in a State Court raising issues alleged to have been adjudicated in the Federal Court, merely because the prior adjudication was coupled with an injunction against relitigation *in advance*?

2. May a Federal Court enjoin prosecution of an action pending in a State Court on the ground of need to effectuate a decree of the Federal Court vesting title to res formerly in the custody of the Federal Court, *before* the jurisdiction of the Federal Court over the matters or its authority to have entered the decrees has been first determined?

For a detailed exposition of this question, petitioner respectfully refers to the petition for rehearing (Rec. pp. 78-90).

3. May a Federal Court enjoin prosecution of an action pending in a State Court on the ground of need to

effectuate a decree of the Federal Court vesting title to res formerly in the custody of the Federal Court where

- (a) No such need is pleaded or shown: and where
- (b) The action in the State Court is one to recover a judgment for money on a personal claim only?

Reasons for Granting Petition

Upon the foregoing statement and the record in the cause, your petitioner is advised and urges, that the orders of the Circuit and District courts granting and sustaining the injunction in issue, should be reviewed by this Court:

1. Because there is doubt as to whether Section 265 of the Federal Judicial Code prohibits a Federal Court from enjoining prosecution of an action pending in a State Court, involving relitigation of issues previously passed upon in the Federal Court wherein litigation was enjoined *in advance*; since this specific question was not before this Court in the *Toucey* case, *supra*.

2. Because there is doubt whether an action pending in a State Court involving issues previously determined in a Federal Court may be enjoined where the jurisdiction of the Federal Court over the matter or its authority to have entered decrees therein is in question and stand undetermined;

3. Because the Circuit Court departed from the accepted course by sustaining an injunction on a ground other than on which it was sought and determined below and by failing to follow rulings and decisions of this Court applicable to the legal principle involved;

4. Because the Circuit Court tacitly sanctioned a departure by the District Court from the established course of judicial procedure, in having enjoined prosecution of

a State Court action on the ground that it involved re-litigation of issues claimed to have been decided in an alleged "class suit" in the Federal Court, contrary to the provision of Section 265 of the Federal Judicial Code; and in having failed to give effect to the applicable principle established by this Court in the *Toucey* case, *supra*.

It is manifest—as the record will make apparent—that the ultimate question is, whether a litigant's constitutional right to invoke in his State Court the remedies provided by law for the enforcement of property rights, may be frustrated by injunction on the ground that the asserted rights had been extinguished by a prior Federal decree, where the jurisdiction of the Federal Court over the subject matter generally, and over the litigant personally, are in issue in a State Court action and stand undecided.

It is respectfully submitted that a writ of certiorari should issue as prayed.

GEORGE F. SALOMON,
Pro Se.

